

1
2
3
4
5
6 UNITED STATES DISTRICT COURT
7 WESTERN DISTRICT OF WASHINGTON
8 AT SEATTLE

9 LEONDIS DAVONE BERRY,)

10 Petitioner,)

11 v.)

12 FRED FIGUEROA,)

13 Respondent.)
_____)

CASE NO. C08-474-JLR-JPD

REPORT AND RECOMMENDATION

14 INTRODUCTION AND SUMMARY CONCLUSION

15 Petitioner is currently in the custody of the Washington Department of Corrections
16 pursuant to a 2002 King County Superior Court judgment and sentence. He has filed a petition for
17 writ of habeas corpus under 28 U.S.C. § 2254 seeking relief from a portion of the sentence
18 imposed following his convictions on robbery charges. Respondent has filed an answer to
19 petitioner's federal habeas petition in which he argues that the petition is time-barred under the
20 federal statute of limitations, 28 U.S.C. § 2244(d). This Court, having reviewed petitioner's
21 petition, respondent's answer, and the balance of the record, concludes that petitioner's federal
22 habeas petition should be dismissed as untimely.

23 PROCEDURAL HISTORY

24 On January 9, 2002, petitioner pleaded guilty to six counts of robbery in the first degree.
25 (See Dkt. No. 15, Ex. 1 at 1 and 6.) Petitioner was sentenced on June 7, 2002, to a total term of
26 369 months confinement which included terms of 129-months confinement on each of the robbery

1 counts, those terms to be served concurrently, and consecutive 60-month terms for special weapon
2 findings on four of the six robbery counts. (Dkt. No. 15, Ex. 1 at 4.)

3 Petitioner did not file a direct appeal. However, in October 2006, petitioner filed a motion
4 to vacate his judgment and sentence in the King County Superior Court. (*See id.*, Ex. 2.)
5 Petitioner argued in his motion to vacate that the firearm sentencing enhancements imposed by the
6 trial court were unconstitutional under *Blakely v. Washington*, 542 U.S. 296 (2004). (*Id.*) In
7 February 2007, the superior court transferred the motion to the Washington Court of Appeals for
8 consideration as a personal restraint petition. (*Id.*, Ex. 3.) The Court of Appeals dismissed the
9 petition in March 2007. (*Id.*, Ex. 5.) Petitioner filed a motion for discretionary review in the
10 Washington Supreme Court. (*Id.*, Ex. 6.) The Supreme Court Commissioner issued a ruling
11 denying review in May 2007. (*Id.*, Ex. 7.) The Court of Appeals issued a certificate of finality in
12 petitioner's personal restraint proceedings in August 2007. (*Id.*, Ex. 8.)

13 Petitioner signed his federal habeas petition on March 19, 2008, and the petition was
14 received by the Court for filing on March 24, 2008. (*See* Dkt. No. 4.)

15 GROUNDS FOR RELIEF

16 Petitioner identifies three grounds for relief in his federal habeas petition:

17 **GROUND ONE:** Petitioner's plea and stipulation did not waive jury trial rights to
18 the determination of aggravating sentencing fact.

19 **GROUND TWO:** The 240 month enhanced portion of the sentence is a *Blakely*
violation because the judge made the finding not jury.

20 **GROUND THREE:** Petitioner did not knowingly, voluntarily, and intelligently
21 waive jury rights for sentence enhancements.

22 (Dkt. No. 4 at 5, 6, and 8.)

23 DISCUSSION

24 On April 24, 1996, the President signed into law the Antiterrorism and Effective Death
25 Penalty Act of 1996 (AEDPA), Pub. L. No. 104-132, 110 Stat. 1214, Sec. 105 (1996), which
26 worked substantial changes in the law of federal post-conviction relief. One of those changes was

1 to adopt a one-year statute of limitations for § 2254 actions. *See* 28 U.S.C. § 2244(d)(1).

2 Section 2244(d)(1) states that the one year limitations period runs from the latest of:

3 (A) the date on which the judgment became final by the conclusion of direct review
4 or the expiration of the time for seeking such review;

5 (B) the date on which the impediment to filing an application created by State
6 action in violation of the Constitution or laws of the United States is removed, if
the applicant was prevented from filing by such State action;

7 (C) the date on which the constitutional right asserted was initially recognized by
the Supreme Court, if the right has been newly recognized by the Supreme Court
8 and made retroactively applicable to cases on collateral review; or

9 (D) the date on which the factual predicate of the claim or claims presented could
have been discovered through the exercise of due diligence.

10 28 U.S.C. § 2244(d)(1).

11 Petitioner does not appear to dispute that he filed his federal habeas petition more than one
12 year after his judgment and sentence became final. Petitioner asserts instead that the instant
13 petition is timely because it was filed within one year of the date the Washington Supreme Court
14 issued its decision denying review of the claims which petitioner asserts in his federal habeas
15 petition. However, the relevant question is not whether petitioner filed his federal habeas petition
16 within one year of the date the state courts disposed of his claims, but whether the petition was
17 timely filed in accordance with the provisions of § 2244(d)(1) as set forth above. The record
18 before this Court makes clear that petitioner's federal habeas petition was not timely filed in
19 accordance with the provisions of § 2244(d)(1).

20 Petitioner's judgment became final, under state law, on or about June 7, 2002. *See* RCW
21 10.73.090(3)(a). Thus, under § 2244(d)(1)(A), petitioner had until on or about June 7, 2003, to
22 file his federal habeas petition.¹ The one year limitations period is tolled for any properly filed
23

24 ¹ Because petitioner's federal habeas claims are based on the relatively recent *Blakely*
25 decision, this Court notes that § 2244(d)(1)(C), which is effectively an exception to the general
26 one-year time limit set forth in § 2244(d)(1)(A), does not apply because the Supreme Court has
not made the rights recognized in *Blakely* "retroactively applicable to cases on collateral review."

1 collateral state challenge to the pertinent judgment or claim. 28 U.S.C. § 2244(d)(2). Petitioner
2 did file a collateral state challenge to his judgment and sentence. However, he did not file that
3 challenge until October 2006, well after the statute of limitations had already expired. Petitioner's
4 personal restraint proceedings in the state courts therefore did not act to toll the statute of
5 limitations. *See Nino v. Galaza*, 183 F.3d 1003 (9th Cir. 1999).

6 The statute of limitations is also subject to equitable tolling. *Laws v. Lamarque*, 351 F.3d
7 919, 922 (9th Cir. 2003). However, the Ninth Circuit has made clear that equitable tolling is
8 available "only when extraordinary circumstances beyond a prisoner's control make it impossible
9 to file a petition on time and the extraordinary circumstances were the cause of his untimeliness."
10 *Id.* (internal quotation and citation omitted). Petitioner does not argue that he is entitled to
11 equitable tolling of the federal statute of limitations.

12 As noted above, petitioner did not sign his federal habeas petition until March 19, 2008,
13 almost five years after the statute of limitations expired in June 2003. Because petitioner filed his
14 petition outside of the § 2254 statute of limitations period, and because petitioner has not
15 demonstrated that he is entitled to either statutory or equitable tolling of the limitations period, his
16 petition is time-barred. This Court therefore recommends that petitioner's federal habeas petition
17 be dismissed, with prejudice, pursuant to 28 U.S.C. § 2244(d). A proposed order accompanies
18 this Report and Recommendation.

19 DATED this 28th day of October, 2008.

20
21 
22 JAMES P. DONOHUE
United States Magistrate Judge